1747. *January* 23.

JOHN LITHGOW *against* The Other CREDITORS on the Estate of Whitehaugh.

No 48.
The deficiency caused by an inhibition found not to affect the whole creditors who contracted after it, but to fall solely upon the least preferable.

IN the ranking of the Creditors on the estate of Whitehaugh, Jean Lithgow, in whose right John Lithgow, writer in Edinburgh, afterwards succeeded, was preferred *primo loco*, upon an heritable bond over the whole estate, and two other creditors were preferred next to her upon heritable bonds, each over a several portion of the estate contained in their respective rights, and other creditors were postponed to them.

There was an inhibition affecting the whole, and in the division of the price this question occurred, Whether the sum drawn by the inhibiter should be deduced from the shares of all the creditors in proportion to their sums? Or if it should be wholly drawn from the postponed creditors, and those preferred draw their whole debt?

*Pleaded* for John Lithgow, That an inhibition was only a ground of reduction, in so far as the debts contracted after, were in prejudice of that secured by the inhibition. It was true, while the subject remained unsold, the inhibiter might attach any posterior right, reserving to the owner his relief, and could not be put off by an allegation of a sufficiency of funds remaining, because this delay, and obliging him to dispute with other purchasers or creditors, would be a real prejudice to him; but when the price of the lands was upon the table, which he immediately drew, he sustained no prejudice in not being suffered to reduce the prior rights, while he could save himself out of the posterior ones; that it would be hard upon creditors, who contracted upon seeing the estate incumbered with an inhibition for a small sum, which was notwithstanding a sufficient security for their debt, if that could be pared away by after-contractions; this would be a great infringement of the faith of the records; whereas the subsequent creditor saw the estate burdened with the after-contraction as well as the inhibition; that a reduction upon an inhibition was like the *actio pauliana* in the Roman law, which required an eventual prejudice, and was so described by Craig, l. 1. D. 12. § 31. who, on these principles, doubted if it could reduce a deed where there was sufficiency of funds; and though the Lords of Session then found otherwise, and it was admitted now to be law, that proceeded from its being a real prejudice to be delayed; but there could be none where the price was ready: That the effect of the infeftment quarrelled stood good against all but the inhibiter, who got the better of it by a rescissory action, but it was not in itself null; and, however the thing might be expressed in words, the inhibiter in effect was first ranked, and the rest after him, in their order: That a case might be put where an inhibiter would draw nothing; and yet a creditor posterior to him draw; as, suppose a subject of 12, affected by two heritable bonds, A for 6, and B for 4; then suppose infeftment taken by C for 8, on a ground of debt prior to them all, and an inhi-

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bition by D, intervening between A and B, they would be ranked, A *primo loco*, B *secundo*, C *tertio*; A would draw 6; and then D, seeking to reduce B's right, would be answered, it was not to his prejudice, because he was cut out by C's infeftment, the ground of whose debt was not struck at by the inhibition; and thus B, whose infeftment was preferable to C, would draw in his place 4, and C *ultimo loco* 2, and the inhibition be entirely excluded.

*Pleaded* for the postponed creditors, That where an inhibition occurred, no argument could be drawn from the danger accruing to the lender, by posterior contractions; for in no case of an inhibition did the records give security; suppose a small debt secured by inhibition on the largest estate, the only way to lend safely, was to see it cleared, else the remainder might be carried off by a subsequent infeftment, the ground whereof was prior to the inhibition.

Lithgow was in an error in supposing the inhibiter to be ranked *primo loco*; for he was never ranked, but the infeftments in their order, and an interlocutor pronounced, reducing them, in so far as they were struck at by that diligence, in consequence whereof he drew as if these were not in the field, which being drawn from them all, must be proportioned upon them. Suppose a security over A and B, then securities given first on A, and then on B, to different creditors, the preferable creditor behoved to draw proportionally from the two subjects, notwithstanding that on A was preferable in time to that on B, and so ought it to be in the present case; or supposing the rule otherwise, there would be a difficulty whether the loss ought to fall on the last infeftment, or on the last lender, though first infeft; if upon the last infeft, no argument could be drawn from there being left a sufficient fund after the inhibition; for the last infeft might have lent, when he saw a fund; and afterwards another, who was quicker in his diligence, be the person whose debt exhausted the subject.

For Lithgow, That in the case put by the Creditors, the infeftments on A and B had no preference betwixt themselves; they were both preferred in the same rank on their respective subjects; that in rankings, where it did not appear what sums would fall to the several creditors, it was necessary to pronounce hypothetical interlocutors, reducing all the debts posterior to the inhibition; but this applied only according to the prejudice done by them to the inhibiter's debt, and if that was not prejudged by any other, which might be two ways, either by there being left sufficient fund to answer it, or its being itself otherwise excluded, the inhibition did not operate.

For the Creditors, That an inhibition was a ground of reduction, whether a fund of payment was left or not, and in this was unlike the reduction on the statute 1681, and the *actio pauliana*.

This case was similar to two prior creditors consenting to a debt, which, in virtue thereof, would be drawn proportionally from both, and not from the last of them.

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That according to the argument pleaded for Lithgow, cases might frequently happen, wherein a creditor would be benefited by another after-contraction; for suppose *first* A, *2dly*, B, two annualrenters, each for 4, then C and D, two adjudgers, each for 4, of whom C had an inhibition, striking against both the annualrenters, and the subject only 6; A would be ranked for 4, B for 2; then C, in virtue of his inhibition, would come to take from them what he would have drawn if they had been out of the field, to wit, 3, for the other 3 would have fallen to D, who is supposed not affected by the inhibition; thus he must draw, according to Lithgow's pleading, in the following manner, 2 from B and 1 from A; but, supposing B not to have contracted, his share would have remained to the adjudgers, and C getting only 1 of it, must have drawn 2 from A, who is thus profited by B's after-contraction; whereas in the other way of drawing proportionally, his draught from A is in either case 2.

That this had been the uniform manner of proceeding, and was determined to be the rule, in the ranking of the creditors of Nicolson, No 35. p. 6963, and directions given to the accomptant to proceed accordingly, which had since been constantly followed.

For Lithgow, That the practice had not been so strong as was alleged; for in Nicolson's case, the rules were not laid down by the Court after mature deliberation, but were only the interlocutor of an Ordinary, perhaps upon the suggestion of the accomptant, as what he thought proper to be followed, and not controverted, because not adverted to by the parties; and there had occurred some cases wherein the contrary rule had been followed, as in one that happened in the ranking of Langton, and was determined *anno* 1703,* wherein Brown an inhibiter was not ranked upon his subsequent adjudication, and an interlocutor reductive pronounced, of the prior rights in his prejudice, but directly *primo loco* on his inhibition, the consequence whereof behoved to be the throwing the deficiency on the last debt affected thereby; and the rule now insisted for was precisely followed, 1729, in the case of Ross of Galston;* and in the ranking of Mr William Stirling's Creditors, the scheme of division wherein was approven, February 17. 1743,* the accomptant having followed the rule contended for on the other side, a prior creditor who was thereby lesed, and who happened to be the person who made up the scheme in Galston's case, took care to have the scheme rectified with regard to him, though others not adverting, it was negligently suffered to stand as it was, as to them; and thus, creditors prior to him were affected by the inhibition, while he was saved; that the contrary practice was only that of the accomptant's following Nicolson's case, and not adverted to by the parties, in a matter of abstract and not very easy consideration.

For the Creditors, That in a partial ranking of some creditors upon Langton, a preference was granted to an inhibiter irregularly, there being no person in the field but he and the annualrenters, who were postponed to him, and whose interest was to have the interlocutor pronounced in that form, as otherwise they

* *See* Appendix.

must have been subjected proportionally to his debt; whereas this threw the whole on others to whom they were preferable: That in the case of Stirling, an interlocutor reductive had not been pronounced against one debt, by which means no charge was laid upon it, but the rest of the procedure was in the ordinary manner; so that there remained only the case of Galston, which was the work of an accomptant, approven of in course by the Ordinary. No 48.

THE LORDS, 13th January 1747, found that the inhibition being prior to, and therefore affecting all the annualrent rights, the deficiency arising from the shortcomings of the funds, did not affect equally, or *pro rata*, all the annualrenters who stood preferred one to the other, but behoved to affect the last preferable.

Act. *Lockhart & R. Dundas.* Alt. *Ferguson.* Clerk, *Forbes.*

*Fol. Dic. v. 3. p. 321. D. Falconer, v. 1. No 160. p. 206.*

*** Lord Kames reports this case:

1747. *January* 13.—IN the ranking of the Creditors of Francis Armstrong, there was produced for John Lithgow an infeftment of annualrent over the whole estate, being the first in time. Next in order were other infeftments of annualrent of different dates; some over one tenement, some over another. And these annualrent-rights did more than exhaust the value of the estate.

For the Earl of Leven was produced an inhibition executed against the common debtor, before any of the debts secured by the said infeftments were contracted. And, by the scheme of division, the debt due to the inhibiter was allocated proportionally upon the several annualrents *pro rata* of the sums drawn by them out of the price of the estate, agreeably to the rule established in such cases.

But Lithgow, who was preferred upon his catholic infeftment, objecting that he ought to bear no burden of the inhibiter's debt, but that the same ought to be laid wholly upon the last infeftment; the objection was reported to the Lords, and the following is a summary of the arguments urged by the parties.

Lithgow's opponents, whose interest it was to support the scheme of division, and the established practice of the court, founded their argument upon the nature of an inhibition, which is a judicial prohibition discharging the debtor, 'to do any deed, whereby any part of his lands, &c. may be apprised, adjudged, or evicted from him, in prejudice of the complainer, and discharging the whole lieges to accept any right from him of his lands, heritages, &c. or to take from him any bonds, obligations, or contracts, whereby any part of the same may be apprised, adjudged, or any ways evicted from the debtor.' This clause lays open the effect of an inhibition, which is only to set aside the deeds granted *lege prohibente*, in order that the inhibiter may have access to the debtor's land, in the same manner as if such deeds had never existed. It is a

No 48. prohibition merely personal against the debtor and the lieges, which may exclude, but cannot prefer. If an inhibiter has any preference, it must be upon other execution affecting the land, such as infeftment, or adjudication, upon which he will be ranked in his order. But then, as the effect of an inhibition is to remove and set aside deeds granted contrary to its prohibition, it reduces all such deeds, simply and absolutely without restriction. If the debtor alienate different parcels of his land to several parties, or give several infeftments upon the same tenement to different creditors, all such deeds are equally liable to reduction at the inhibiter's instance, the first as well as the last. It is no defence to the first creditor or purchaser, that he got right to a small part only of the debtor's estate, and left a sufficiency for payment of the inhibiter. The letters expressly prohibit him to take right to any part of the debtor's estate, or to accept any bond or contract, whereby any part of it may be adjudged or evicted. It will not even be a defence against this reduction, that the debtor is still sufficient and able to pay the debt. Sir Thomas Craig observes, that it was so determined in a process at the instance of the Countess of Crawford against the Laird of Garthland,* for reducing a right granted to him by her debtor, whom she had inhibited, lib. 1. dieg. 12. § 31. 'Nam licet aliun 'de debitor erat idoneus facultatibus et solvendo; alienationem tamen 'in dictum dominum factam, rescindendam censuit senatus.' And in fortification of this point, the uniform practice of the court was appealed to, of reducing without distinction all deeds posterior to inhibition; in none of which was it ever sustained as a defence, that the common debtor, after the alienation, had a sufficient fund remaining for payment of the inhibiter.

This point was illustrated by comparing the effect of an inhibition with that of a consent given by one creditor to another's preference. If two real creditors consent to a subsequent contraction, the creditor, to whom the consent is given, is preferable before both of them equally; and each of them, by virtue of the consent, must yield place to him equally.

The conclusion is, that an inhibiter is entitled to reduce and set aside equally every right granted posterior to his inhibition; and consequently to draw a share of the inhibiting debt from each of them *pro rata*.

On the other hand, to support the objection made by Lithgow against the scheme, it was *urged*, 1*mo*, That an inhibition is a ground of preference upon the land; that the inhibiter is entitled to be preferred *primo loco*, the first annualrenter *secundo loco*, and after him the others in their order, which must make the loss to fall upon the last infeftment.

In answer to this, it was *observed*, as above, That this argument is founded upon an obvious mistake; because an inhibition gives no real preference upon the land, but is merely a personal prohibition, forbidding the debtor to alienate in prejudice of the inhibiter, and forbidding the lieges to contract with the debtor.

* *See* Appendix.

It was *urged*, in the *second* place, for Lithgow, That, by the stile of inhibition, the debtor is discharged to contract or grant any deed whereby his land may be adjudged or evicted from him, in prejudice of the complainer; that therefore the complainer can challenge the debtor's deeds no further than he sustains prejudice; and he sustains no prejudice by the first deed, if the fund left be sufficient to pay him. No 48.

It was *answered*, That, in the strictest sense of the word, every alienation is prejudicial to the complainer, by lessening his security. And it is justly so understood in practice; for otherways it would occasion endless disputes about the extent and value of what is left, whether it be or be not sufficient to answer the inhibiting debt; which would render an inhibition a troublesome and frequently a fruitless execution.

It was *urged* for Lithgow, in the *third* place, That the rule contended for by his parties would greatly prejudice the security of the records; because no man could safely lend the smallest sum after inhibition, though he knew the debtor's estate was able to pay both his debt and the inhibiter's, twenty times over. And it were absurd to suppose, that a creditor, who had taken infeftment upon an estate, which he saw liable to no incumbrance but an inhibition for a small sum, and thus had secured himself by all the forms of law, should be hurt by a posterior deed granted by his debtor.

It was *answered*, That, attending to the nature of an inhibition and its effect, every one must see it is impossible there can be any security to an after contractor, though he obtain infeftment, unless he take care to see the inhibiter paid or secured. Suppose an inhibition is used against a debtor for no more than L. 1000, and his estate is worth L. 40,000, yet no man can safely lend another L. 1000 to the debtor upon an infeftment, for he cannot know but another infeftment may be afterward taken of L. 39,000, upon a bond granted before the inhibition; and, in that case, the inhibiter will evict from the first annualrenter the L. 1000, for which he was ranked; and this annualrenter can have no recourse against the second, but must lose his debt. Thus it appears that no man that takes an infeftment for the smallest sum, after an inhibition, can be certain that the fund he affects may not be the only fund out of which the inhibiter can draw his payment; and, consequently, he is truly as guilty of the contempt of the law as any of the posterior contractors. He has taken a security *lege prohibente*; and he must submit to the legal consequences of that prohibition. He sees it may subject him to have the whole security evicted from him without remedy; and what reason has he to complain that he is subjected to the inhibiter's debt equally with the other creditors who have contracted under the same prohibition? And it is a palpable mistake to say, that a creditor who lends upon an infeftment after inhibition, has secured himself by all the forms of law, for there are many methods obvious in law, whereby he could have obtained a security liable to no challenge. As, *first*, by advancing a little more money to clear the inhibiter; or by granting his bond, and taking infeft-

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ment for security of the whole sum, as well due to the inhibiter as advanced by himself; or by causing the debtor to grant infeftment to the inhibiter, and then he can be in no danger. Or, *thirdly*, by inhibiting the debtor upon his warrandice, which gives him recourse against other subjects belonging to the debtor. Or, *fourthly*, by taking infeftment of warrandice against the effect of the inhibition.

It was *urged*, in the *last* place, That the creditor last in order is in *mala fide* to lend his money, or take the real security, when he sees the lands exhausted by prior infeftments, and by the inhibition.

*Answered*, It often happens, that the creditor who takes the first infeftment is more in *mala fide* than those who come after. The common case is, that a man, after inhibition, contracts personal debt, perhaps to no great extent; he continues in good credit; comes to be in labouring circumstances, and can procure no money but upon real security. He borrows a considerable sum, and the creditor obtains the first infeftment; after which the prior creditors, diffident of their security, obtain heritable bonds of corroboration, and are infeft. In the spirit of what is pleaded for Lithgow, the latest creditor who lent his money upon heritable security, when his debtor was in labouring circumstances, ought, as having the first infeftment, to bear no share of the burden of the inhibition; but the same ought to be totally laid upon the prior creditors, which is absurd.

Found, that the inhibition being prior to, and therefore affecting the annualrent-rights, the deficiency arising from the shortcoming of the fund, does not affect equally, or *pro rata*, all the annualrenters who stand preferred one before the other; but must affect the least preferable.

Through the weight of this decision, though deviating from the nature of an inhibition, the same judgment was given in the ranking of the Creditors of Langton, 8th January 1760, No 60. p. 6995.

*Rem. Dec. v.* 2. *No* 78. *p.* 119.

*** See Kilkerran's report of this case, No 101. p. 2896. *voce* Competition.

*** The case in the ranking of Langton, referred to p. 6976, is No 94. p. 2877.

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No 49.
Inhibitions are not allowed to pass, on conditional obligations, where there is no appearance of the existence of the condition.

1747. *January* 27. M'Creadie *against* M'Creadies.

In the contract of marriage of Andrew M'Creadie younger, now of Pearston, Andrew M'Creadie his father provided the estate of Pearston 'to his son, and 'the heirs-male of the marriage, which failing, to the heir-male of any other 'marriage; and in case of daughters only, and no heirs-male, the father and 'son became bound to pay certain sums to the daughters, one or more.'

After the death of Andrew M'Creadie elder, his daughters and executors observing that their father was bound for the said provisions to the daughters of